1-13-2015

State v. Smith Appellant's Brief Dckt. 42090

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. LAURA L. SMITH, Defendant-Appellant.	NO. 42090 BONNER COUNTY NO. CR 2012-5464 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

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STATEMENT OF THE CASE

Nature of the Case

Laura Smith appeals from her judgment and conviction for aiding and abetting in delivery of a controlled substance. On appeal, Ms. Smith contends that her rights under the Confrontation Clause were violated when the district court admitted a non-witness's out-of-court statements, as heard through the recording of one of the undercover officers initiating the delivery of the controlled substance, and that the district court erred in admitting additional hearsay statements through the officer. She further asserts that, at most, the State merely proved her presence or proximity to the alleged crime, not that she aided and abetted in the crimes. Therefore, she asserts that the State failed to offer evidence sufficient to support her conviction and that her conviction must be vacated with prejudice.

Statement of the Facts and Course of Proceedings

Laura Smith was charged with aiding and abetting delivery of a controlled substance. (R., pp.62-63.) Ms. Smith exercised her constitutional right to a jury trial.

The following facts were adduced at trial: On March 16, 2012, Officer Clinton Mattingly and Detective Shane Hight were working undercover at a bar in order to make arrangements to purchase marijuana from Shawn Kendle. (Trial Tr., p.69, Ls.18-25, p.72, L.18 – p.73, L.11.) The officers had conducted prior controlled buys of marijuana from Mr. Kendle during their multi-week sting operation. (Trial Tr., p.112, Ls.16-19, p.176, Ls.22-24, p.177, Ls.9-10.) Mr. Kendle agreed to sell Detective Hight marijuana, but Mr. Kendle needed to travel offsite to obtain the marijuana, and the officers were leery of leaving the bar; so instead, Mr. Kendle offered to supply the officers with

psilocybin mushrooms. (Trial Tr., p.74, Ls.1-12, p.76, L.7 – p.77, L.6.) Mr. Kendle responded that he had a contact person to talk to, and she was at the bar.[1] (Trial Tr., p.77, Ls.9-10.) In lieu of the marijuana, Mr. Kendle agreed to sell Detective Hight one ounce of psilocybin mushrooms for $150. (Trial Tr., p.74, Ls.1-15, p.76, L.22 – p.77, L.6.) Mr. Kendle walked to the back of the bar, spoke to Laura Smith for approximately five minutes, and then walked back over to the officers. (Trial Tr., p.80, Ls.16-19, p.81, Ls.2-7, State's Trial Ex. 1.) A few minutes later Ms. Smith left the bar. (Trial Tr., p.131, L.25 – p.132, L.6; State's Trial Ex. 1.)

Officer Mattingly watched Ms. Smith leave the bar parking lot in a red car, and return to the bar some ten minutes later and pull into the same parking spot. (Trial Tr., p.82, L.11 – p.83, L.7.)

Ms. Smith exited the car holding a brown paper bag. (Trial Tr., p.84, Ls.20-25; State's Trial Ex. 1.) She walked over to Mr. Kendle's pickup truck. (Trial Tr., p.87, Ls.12-14.) At that point she was out of the view of Officer Mattingly and the video recorder. (Trial Tr., p.88, Ls.18-20; State's Trial Ex. 1.) He testified that he heard what sounded like a car door opening and closing. (Trial Tr., p.87, Ls.13-16.) Ms. Smith then walked away from the vehicle without the paper bag and re-entered the bar, taking her place back on the barstool she had previously been sitting on. (Trial Tr., p.87, Ls.16-21, p.91, Ls.3-5.) The officers then went outside the bar with Mr. Kendle and exchanged the $150 for a brown paper bag containing mushrooms. (Trial Tr., p.90, Ls.4-15, p.92, L.22 – p.93, L.9, p.107, Ls.6-9.)

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[1] Officer Mattingly testified: "At that point – Mr. Kendle says I've got her in the bar right now, the person to talk to." (Trial Tr. P.77, Ls.9-10.) However, the audio is extremely difficult to hear, thus appellate counsel must proceed on the assumption that Officer Mattingly correctly represented Mr. Kendle's sole statement implicating Ms. Smith, or at least a female in the bar that day. (State's Trial Ex. 1.)

David Sincerbeaux, who performs forensics for the Idaho State Police, testified that the contents of the bag tested positive for being psilocybin mushrooms. (Trial Tr., p.162, Ls.5-25.)

At trial, over the objections of defense counsel, the district court permitted an audio/video recording to be played to the jury that contained a portion of the conversation between the undercover officers and Mr. Kendle.[2] (Trial Tr., p.77, L.23 – p.92, L.20.) Mr. Kendle did not testify at trial. Defense counsel objected to the admission of the audio portion of the video, but the district court overruled the objection and allowed the video to be played with sound. (Trial Tr., p.54, L.25 – p.55, L.7.) As the video played, Officer Mattingly testified as to what was being said, including what Mr. Kendle was saying. (Tr., p.80, Ls.12-19.) Defense counsel also objected to this testimony as hearsay, but the district court overruled the objection and allowed the hearsay statements to be relayed to the jury. (Tr., p.80, Ls.20-24.)

The State then rested and Ms. Smith moved for a judgment of acquittal. (Tr., p.199, L.11 – p.201, L.7.) Counsel for Ms. Smith argued that there was no evidence that Ms. Smith knew what was in the bag. (Tr., p.199, L.13 – p.201, L.7.) The district court denied the motion. (Tr., p.202, Ls.16-23.)

After a one day jury trial, Ms. Smith was convicted of the charge. (R., p.132.) On March 31, 2014, the court imposed a unified sentence of four years, with two years fixed, but suspended the execution of the sentence and placed Ms. Smith on probation for three years. (R., pp.146-153.)

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[2] Officer Mattingly had a video camera on his person—in the chest area—and surreptitiously recorded the conversation between himself, Shawn Kendle, and Detective Hight. (Trial Tr., p.75, Ls.5-18.)

Ms. Smith filed a notice of appeal on April 21, 2014. (R., pp.159-160.) She asserts first that the district court violated her Confrontation Clause rights under the Sixth Amendment when it allowed the audio of the video to be played which contained statements by a declarant who was not called to testify, and that the district court further erred in allowing additional hearsay statements through the officer and, finally, that there is insufficient evidence to support her conviction.

ISSUES

1. Was Ms. Smith's right to confront witnesses violated when the district court allowed the jury to hear recorded statements of an individual who did not testify at trial, and did the district court erroneously allow hearsay statements to be admitted into evidence?

2. Was there insufficient information to support the conviction in this case?

ARGUMENT

I.

The District Court Erred In Admitting The Out-Of-Court Statements Of Shawn Kendle In Violation Of Ms. Smith's Right To Confront Witnesses And In Allowing Hearsay Statements Of Shawn Kendle Through An Officer

A. Introduction

Ms. Smith asserts that the district court violated her constitutional rights to confront witnesses. At trial, the State admitted a video/audio recording surreptitiously made by one of the undercover officers. The tape contained numerous statements by Shawn Kendle and was admitted over defense counsel's objection. (Trial Tr., p.13, Ls.13-17.) However, Mr. Kendle did not testify at trial. (Trial Tr., p.207, L.25 – p.208, L.1.) The district court also erred when it allowed the officer to offer inadmissible hearsay evidence as to the statements by Mr. Kendle.

B. The District Court Erred In Ruling That Shawn Kendle's Statements Were Admissible; As Mr. Kendle Did Not Testify At The Trial, The Admission Of His Statements Violated Ms. Smith's Right To Confront Witnesses

Over defense counsel's objection, the prosecution was permitted to play an audio and video recording in which Mr. Kendle, purported to be the principle actor in the delivery of the mushrooms, told the officers that he could get mushrooms for them—and stated that his source, "she," was in the bar.

The United States Constitution affords a criminal defendant the right "to be confronted with the witnesses against him." U.S. CONST. amend VI. "Confrontation" requires an adequate opportunity to cross-examine an adverse witness. *United States v. Owens*, 484 U.S. 554, 557 (1988). Thus the prosecution may not use testimonial statements of an unavailable witness at trial unless the defendant has had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36,

53-54 (2004). The Idaho Constitution also affords criminal defendants the right to confront adverse witnesses. IDAHO CONST. art. I, § 13. The confrontation right provided for under the Idaho Constitution is coextensive with the Sixth Amendment's Confrontation Clause. *State v. Sharp*, 101 Idaho 498, 502 (1980); *State v. Mantz*, 148 Idaho 303, 305 n.1 (Ct. App. 2009).

In this case, the State sought to admit the video recording, with audio, into evidence. The district court initially ruled that the video would not be admitted because the court "couldn't hear a word." (Trial Tr., p.9, Ls.3-6.) Defense counsel specifically objected to the audio portion of the videotape coming in, and maintained that objection throughout the playing of the video with audio. (Trial Tr., p.11, L.19 – p.12, L.25, p.78, Ls.9-14, p.79, Ls.12-15.) Defense counsel objected to the audio based on Confrontation Clause grounds: "And again, my objection is that I don't have a right – I don't get an opportunity to cross examine this man [Mr. Kendle] about what he's saying. . . ." (Trial Tr., p.13, Ls.13-16.)

Later the district court altered/clarified its previous ruling and told the prosecutor that he could play the audio, but that the court was concerned that the jury wouldn't be able to hear what was being said. (Trial Tr., p.54, L.25 – p.55, L.7.) Defense counsel maintained his previous objection to all of the early material—the beginning of the audio where Mr. Kendle, Officer Mattingly, and Detective Hight conversed outside the bar. (Trial Tr., p.4, Ls.4-18, p.78, Ls.9-11.) The audio and video were admitted beginning with a portion of the conversation outside the bar between Mr. Kendle, Officer Mattingly, and Detective Hight. (Trial Tr., p.78, L.6 – p.79, L.12; State's Trial Ex. 1.)

1. Because The Statements Of Mr. Kendle Were Testimonial, Ms. Smith's Constitutional Right to Confrontation Was Violated When The Video Was Played For The Jury

The statements of Mr. Kendle, as heard in the video recording, were testimonial in nature as they were elicited solely for purposes of criminal investigation and prosecution.

The United States Supreme Court's decision in *Crawford v. Washington*, is the source of the current meaning and proper analysis of the Confrontation Clause. 541 U.S. 36 (2004). *Crawford* instructs that the Confrontation Clause prohibits the admission of testimonial statements as evidence at trial unless the declarant is made available for cross-examination. *Id.* at 68. The *Crawford* Court identified three non-exclusive classes of testimonial statements: (1) *ex parte* in-court testimony or its functional equivalents (such as affidavits or custodial examinations); (2) extrajudicial statements contained in formalized testimonial materials; (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52; *State v. Hooper*, 145 Idaho 139, 143 (2007).

In order to help courts determine whether a statement is testimonial, particularly when a statement did not clearly fall into one of the *Crawford* classes of testimonial statements, the Supreme Court subsequently adopted the "primary purpose" test. *Davis v. Washington*, 547 U.S. 813, 822 (2006). The primary purpose test evaluates whether the statement in question was made with the primary purpose to establish or prove past events potentially relevant to a later criminal prosecution. *Id.*; *see also Michigan v. Bryant*, 131 S. Ct. 1143, 1154 (2011). If the statement was made with such a purpose, then it is testimonial and barred by the Confrontation Clause absent an

opportunity to cross-examine the declarant. *See Bryant*, 131 S. Ct. at 1154 (explaining the decision in *Hammon v. Indiana*, 547 U.S. 813 (2006)[3]). However, if the statement was made with some other primary purpose, such as addressing an ongoing emergency, then the statement is nontestimonial. *See id.* (explaining the decision in *Davis*). "The determination as to whether a statement is testimonial must be made under the totality of the circumstances with particular focus on the principal evil sought to be remedied by the Sixth Amendment's Confrontation Clause—the use of ex parte examinations as evidence against an accused." *Hooper*, 145 Idaho at 145.

Here, the video contained statements by Mr. Kendle identifying his source for the mushrooms; specifically he said "I've got her in the bar." (Trial Tr., p.9, L.21; State's Trial Exhibit 1.) Such was a testimonial statement that was recorded solely with the intention of using it to later prosecute Ms. Smith.

The statements of Mr. Kendle as heard in the video recording were made in response to questions from undercover law enforcement seeking to purchase controlled substances. As such, they were testimonial in nature as they were being elicited solely for purposes of criminal investigation and prosecution.

2. Mr. Kendle Was Not Shown To Be Unavailable To Testify

Mr. Kendle had not been found unavailable such that the first prong required by the Confrontation Clause was satisfied.

One the evidence is determined to be testimonial, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for

[3] *Hammon* was a companion case decided with *Davis v. Washington*.

cross-examination." *State v. Mantz*, 148 Idaho 303, 306 (Ct. App. 2009) (*quoting Crawford*, 541 U.S. at 68.

The Idaho Court of Appeals has held:

> When two equally probative versions of the same evidence is available, the live testimony is not only favored by the Confrontation Clause but required unless the hearsay declarant is shown to be unavailable.

Doe v. State, 133 Idaho 811, 817 (Ct. App. 1999) (internal citation omitted) (holding that Confrontation Clause required showing of witnesses' unavailability prior to the admission of the videotaped statements).

"[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). Further, the value of the Confrontation Clause to a defendant "is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses." *Id. at* 324-25.

Here, it is clear from the record that the parties proceeded under the belief that Mr. Kendle would invoke his Fifth Amendment right not to incriminate himself based on the discussion between the parties at the pretrial hearing on January 13, 2014. (*See generally* 1/13/14 Tr.; Trial Tr., p.14, Ls.15-23.) Mr. Kendle's counsel represented to the parties that Mr. Kendle would not testify should he be called in the case; however, the district court conducted no hearing during which this representation was confirmed, and Mr. Kendle was never brought to court and asked if he intended to invoke his Fifth Amendment right against self-incrimination. (*See* 1/13/14 Tr.; *see also* Trial Tr.) Further, although the prosecutor claimed that defense "counsel could have subpoenaed this witness and tried to get him to testify" (Trial Tr., p.14, Ls.15-17), the burden is on

the prosecution to present its witnesses, not on the defendant to bring adverse witnesses to court. *See Melendez-Diaz, supra.* Thus the district court never determined whether Mr. Kendle was available as a witness, and he was not called to testify at trial.

3. Ms. Smith Did Not Have A Prior Opportunity To Cross-Examine Mr. Kendle

The district court erred when it allowed Mr. Kendle's statements to be introduced into evidence via the video recording of the conversation, as he did not testify at the preliminary hearing in this case, and Mr. Kendle was never otherwise available for cross-examination by the defense.

The right to confrontation "guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *State v. Davis*, 152 Idaho 652, 657-58 (Ct. App. 2011) (*quoting United States v. Owens*, 484 U.S. 554, 559, 564 (1988).

Mr. Kendle did not testify at the preliminary hearing in this case. (R., pp.64-73.) Mr. Kendle was never called as a witness at trial. (*See* Trial Tr.)

Where Mr. Kendle was never called at trial or the preliminary hearing, defense counsel had no opportunity to cross-examine Mr. Kendle regarding the statements he made in the video, thus Ms. Smith's right to confront witnesses against her was violated when the audio portion of the video was admitted into evidence.

C. The District Court Erred By Allowing Officer Mattingly To Offer Inadmissible Hearsay Evidence As To The Statements Of Mr. Kendle As The Out-Of-Court Statements Did Not Fall Within Any Recognized Exception To The Hearsay Rules

In addition to the objection on confrontation grounds, defense counsel also objected to Officer Mattingly's testimony recounting the conversation between the police and Mr. Kendle because the testimony constituted hearsay evidence. (Trial Tr., p.80, Ls.12-23.) The district court overruled that objection as well. (Trial Tr., p.80, L.24.)

Hearsay is an out-of-court statement offered for the truth of the matter asserted. I.R.E. 801(a). Such statements are inadmissible as evidence unless they fall under a recognized exception to the hearsay rule. I.R.E. 802.

Officer Mattingly testified as follows:

> Q. Detective, what are we seeing in this shot right here?
>
> A. This is after we've come back. Both of us have – all three of us have come back into the bar. The gentleman standing with his back in the green shirt to us is Mr. Kendle. He is standing at the bar talking to what he said was his person that could supply him with mushrooms.
>
> DEFENSE COUNSEL. Your Honor, I'm gonna object as to what he said. He's not testifying and that's hearsay and it's a violation of my client's right of confrontation, if they have it on the record.
>
> THE COURT. I'll overrule.

(Trial Tr., p.80, Ls.12-24.)

The statement was essentially the only evidence admitted at trial that implicated Ms. Smith in the delivery of the mushrooms. The testimony was certainly offered for the truth of the matter asserted—that Ms. Smith was present in the bar and would procure the mushrooms the officers sought to purchase. However, the hearsay testimony conveyed by Officer Mattingly did not fall within any recognized exception to the

hearsay rules and thus the district court erred in overruling the objection and allowing the statements into evidence.

II.

There Was Insufficient Evidence To Support The Conviction For Aiding And Abetting The Delivery Of A Controlled Substance

A. Introduction

Ms. Smith asserts that there was insufficient evidence to support the jury's verdict in this case because the State failed to prove, beyond a reasonable doubt, that she aided or abetting in the delivery of a controlled substance. At most, she asserts that the State demonstrated mere presence or proximity to the alleged crimes, which is insufficient to support her conviction.

B. Standard Of Review

Upon review of a challenge of the sufficiency of the State's evidence to support a conviction, this Court's review is of limited scope. This Court will not overturn a jury verdict where there is substantial, competent evidence upon which a reasonable trier of fact could have found that the State sustained its burden of establishing, beyond a reasonable doubt, the essential elements of the charged offense. *See, e.g., State v. Herrera-Brito*, 131 Idaho 383, 385 (Ct. App. 1998). This Court does not substitute its view of the evidence for that of the jury with regard to matters of the credibility of the witnesses, the weight to attach to the testimony, or the reasonable inferences that may be drawn from the evidence. *Id.* In addition, this Court views the evidence in the light most favorable to the State. *Id.* The remedy where a verdict is not supported by sufficient evidence is to reverse the defendant's convictions with prejudice. *See State v. Byers*, 102 Idaho 159, 167 (1981).

C. There Was Insufficient Evidence To Support The Conviction For Aiding And Abetting The Delivery Of A Controlled Substance

Laura Smith was charged with aiding and abetting delivery of psilocybin mushrooms. Specifically, the information alleged that Ms. Smith, "did aid and abet Shawn Kendle in unlawfully delivering a controlled substance, to-wit: Psilocybin/Psilocyn Mushrooms," who delivered the substance to Detective S. Hight. (R., pp.62-63.) Ms. Smith submits that there is insufficient evidence to support her conviction because, at most, the evidence merely shows Ms. Smith's proximity to criminal activity.

Looking at the evidence in the light most favorable to the State, Ms. Smith submits that the admissible evidence[4] was as follows: Ms. Smith was in the bar at the same time as Officer Mattingly and Shawn Kendle. Ms. Smith left the bar and drove away in her car. Ms. Smith returned to the bar approximately 10 minutes later. She walked toward Mr. Kendle's truck holding a plain brown paper bag. Officer Mattingly testified that he believed he heard the truck door open then close. Ms. Smith kept walking, but no longer had the bag in her hand. Shawn Kendle and the officers went outside. He was alone in the truck when he moved it. (Trial Tr., p.133, L.10 – p.134, L.13, p.182, L.18 – p.183, L.6.) The truck was never searched. (Trial Tr., p.134, Ls.14-16.) When Mr. Kendle opened the door, Detective Hight grabbed a plain brown paper bag from Mr. Kendle's floorboard that contained psilocybin mushrooms. (Trial Tr., p.183, Ls.3-14, p.194, Ls.21-25.) However, there is no admissible evidence Ms. Smith and Mr. Kendle were working together to procure and deliver the mushrooms. Further, there is no evidence that the bag held by Ms. Smith contained

[4] Excepting the improperly admitted evidence of what Mr. Kendle said, as explained in Section (I).

psilocybin mushrooms and there is no evidence that Ms. Smith knew or believed that it contained illegal drugs. There is no evidence that Ms. Smith put the brown paper bag in the truck. Further, there is no evidence that there was only one brown paper bag in Mr. Kendle's truck.[5] In fact, the officers testified that they couldn't fully see inside the truck. (Trial Tr., p.184, Ls.11-20.) Even supposing that Ms. Smith did place the brown paper bag in Mr. Kendle's truck, there was no evidence establishing that the bag Detective Hight procured was the same bag that Ms. Smith put in Mr. Kendle's truck. Further, the officers never heard what Mr. Kendle said to Ms. Smith and never saw any money exchange hands. (Trial Tr., p.103, Ls.18-21, p.179, Ls.2-5, p.181, Ls.15-24.) No fingerprints matching those of Ms. Smith were found on the drugs; the bag was not even fingerprinted. (Trial Tr., p.194, Ls.3-12.) Ms. Smith was never caught with any of the buy money. (Trial Tr., pp.4-10.) Thus, Ms. Smith submits that at most, the State demonstrated her proximity to illegal activity, not her active participation in it.

Importantly, Ms. Smith was charged with aiding and abetting, not the possession or the delivery itself. There is a subtle difference between the mental state elements between a principle and an aider and abettor. "The mental state required is generally the same as that required for the underlying offense-the aider and abettor must share the criminal intent of the principal and there must be a community of purpose in the unlawful undertaking." *State v. Romero-Garcia*, 139 Idaho 199, 204 (Ct. App. 2003). As to the criminal acts completed by a person actually committing a crime and an aider and abettor, the Idaho Supreme Court has recognized that, "'aiding and abetting'

[5] Officer Mattingly testified that he could not see any other bags in the vehicle at the time he was standing next to it, but admitted that the pickup was never searched—either before or after Mr. Kendle got into it and moved it closer to the motorcycles. (Trial Tr., p.107, Ls.13-21, p.122, Ls.11-16.)

requires some proof that the accused either participated in or assisted, encouraged, solicited, or counseled the crime."[6] *State v. Randles*, 117 Idaho 344, 347 (1990) (*overruled on other grounds by State v. Humpherys*, 134 Idaho 657 (2000)). "Aiding and abetting contemplates a sharing by the aider and abettor of the criminal intent of the perpetrator." *State v. Mitchell*, 146 Idaho 378, 383 (Ct. App. 2008). That is, "the aider and abettor must have the requisite intent and have acted in some manner to bring about the intended result." *Id.*

Such evidence is lacking in this case. The evidence in this case is that Ms. Smith was present in the bar, but there is no evidence that she delivered mushrooms to Mr. Kendle, or facilitated the delivery in any way.

Mere acquiescence in, or silent consent to the commission of an offense on the part of a bystander, however reprehensible the crime may be, is not sufficient to make one an accomplice. *State v. Brooks*, 103 Idaho 892, 904 (Ct. App. 1982) (citing *State v. Sensenig,* 95 Idaho 218 (1973)). Thus, even assuming that Ms. Smith knew about the drug deal, the State was required to prove more than acquiescence or silent consent; the State was required to demonstrate "actual encouragement" in the crime. *State v. Grant*, 26 Idaho 189, 197 (1914). And there is no evidence that Ms. Smith facilitated the delivery to Mr. Kendle in any way. At most the State proved that Ms. Smith was in the bar when the mushroom transaction was arranged, which was insufficient evidence.

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[6] In United States v. *Lopez*, 484 F.3d 1186 (9th Cir. 2007), the Ninth Circuit, sitting *en banc*, recognized that "aiding and abetting has four elements including, as most relevant here, 'that the accused had the specific intent to facilitate the commission of a crime by another' and 'that the accused assisted or participated in the commission of the underlying substantive offense.'" *Lopez*, 484 F.3d at 1199; *see also United States v. Gaskins*, 849 F.2d 454, 459-60 (9th Cir. 1988) (noting the difference between the elements of aiding and abetting and the elements of being a principle).

Thus, Ms. Smith submits that there is insufficient evidence in the record to support her conviction and she requests that her conviction be reversed.

CONCLUSION

Ms. Smith requests that her conviction be reversed. Alternatively, Ms. Smith respectfully requests that her judgment of conviction be vacated and the case remanded for a new trial.

DATED this 13th day of January, 2015.

SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of January, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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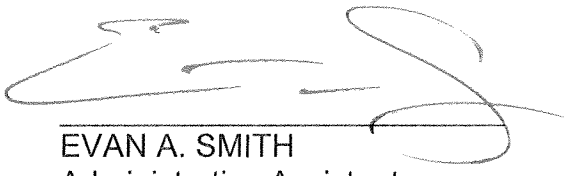

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SJC/eas